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defendant Paul Montwillo

UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual;
Plaintiff,

vs.

WILLIAM TULL, an individual; DANIEL
GIBBY, and individual; GIBBY
NOVELTIES, LLC dba ARSENIC & APPLE
PIE, a California limited liability company;
and DOES 1-100, inclusive,
Defendants.

WILLIAM TULL, an individual;
Counter-Claimant,

vs.

PAUL MONTWILLO, an individual, and
DOES 21 through 30, inclusive,
Counter-Defendants

Case No. C 07 3947 SI

SUPPLEMENTAL DECLARATION OF
STEPHEN A. SOMMERS IN SUPPORT OF
MOTION FOR SUMMARY JUDGEMENT
OF PLAINTIFF PAUL MONTWILLO

Date: April 25, 2008

Time: 9:00 a.m.

Court: Room 10, 19th Floor

Judge: Honorable Susan Illston

Complaint Filed: August 1, 2007

Counterclaim Filed: January 11, 2008

Trial Date: June 30, 2008

I, Stephen A. Sommers, declare:

I. I am an attorney licensed by the State of California, admitted to practice before
this Court since 2003, and am counsel for Plaintiff Paul Montwillo. I am authorized by my client

1 to make this Supplemental Declaration in support of his Motion for Summary Judgment, filed
2 herewith.

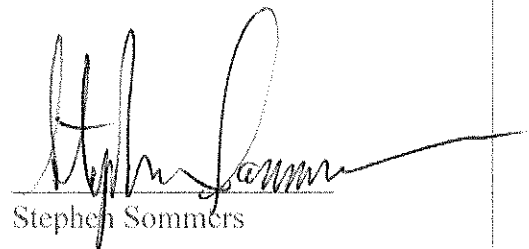
3 2. On March 20, 2008, I conducted the deposition of Defendant, William Tull, in
4 this action. Mr. Tull was represented by his attorneys David Y. Wong and Marc H. Greenberg.

5 3. The Memorandum of Points and Authorities in Opposition to Defendants' Motion
6 for Summary Judgment contains citations to deposition testimony of William Tull. Attached
7 hereto and incorporated by reference herein are true and correct copies of the deposition
8 transcript pages, in full wherein each of the cited testimony excerpts may be found. I declare that
9 the deposition testimony as recited in the transcript attached accurately reflects the actual
10 deposition. The pages attached are arranged in numerical order as follows: 25-35, 56, 104-105.

11 I certify under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct, and that I am able to testify competently thereto.

13
14 Executed in San Francisco, California on April 4, 2008.

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Stephen Sommers

EXHIBIT A

1 A. Yes.

2 Q. And at some time after that, did you and -- did
3 Mr. Montwillo ask to sell, ask you to sell more dolls
4 in your store?

5 A. Mr. Montwillo didn't, no. The buyer of my store
6 mentioned it.

7 Q. And who is that?

8 A. It's Woody Evans.

9 Q. Woody Evans? And is he your employee?

10 A. Yes, he is.

11 Q. And what did Mr. Evans tell you about the dolls?

12 A. That Paul had dressed up some Barbies and that people
13 seemed to like them. And if it was possible, we
14 could enter into an agreement that, you know, he
15 would get the wholesale price, and we would double
16 his wholesale price and we would pay him for the
17 dolls that we sold.

18 Q. And did you ever have a conversation directly with
19 Mr. Montwillo about what the dolls would look like
20 that would be sold in your store?

21 A. Never. You mean Barbie dolls?

22 Q. Yes.

23 A. No, no, absolutely not. I had nothing to do with it.

24 Q. When Mr. Montwillo initially put the Barbie dolls in
25 your store, did he sell a Barbie doll that was called

1 Trailer Trash Barbie doll?

2 A. I don't know.

3 Q. Do you recall any of the models that were originally
4 sold?

5 A. Oh, yeah, yeah.

6 Q. What were some of the other dolls that were sold that
7 you recall?

8 A. Well, I mean, he did various things to various dolls.

9 Q. Specifically --

10 A. They were all different. Every doll was different.
11 Dressed differently, but I can tell you honestly I
12 never really paid attention to them.

13 Q. Do you recall any drag queen dolls?

14 A. No, I don't recall any.

15 Q. Do you recall any specific dolls that were sold?

16 A. Not specifically. I mostly recall the packaging.

17 Q. And the packaging, that was the pink packaging?

18 A. The pink packaging, yeah.

19 Q. At a certain point after Mr. Montwillo started
20 selling the dolls in your store, did you come in
21 contact with the attorneys for Mattel, Incorporated?

22 A. Well, first Mr. Montwillo wasn't selling the dolls in
23 the store; I was selling them. They were dolls that
24 he had in my store that I sold under my auspices.

25 Q. Did you purchase the dolls at wholesale price?

1 A. No, they were on --

2 Q. Consignment?

3 A. -- consignment. Yeah, they were on consignment.

4 Q. So at a certain point, were you contacted by lawyers
5 from Mattel?

6 A. Yes.

7 Q. Were you sued by Mattel?

8 A. Yes, I was.

9 Q. And what did Mattel sue you for?

10 A. They sued me -- well, I don't really remember
11 accurately, so I probably shouldn't venture on --

12 Q. What's your best estimate for that?

13 A. My best estimate would be a guesstimate. Truly, I'm
14 not a lawyer; I'm not going to venture.

15 Q. Did they sue you over the dolls?

16 A. Yes, they did.

17 Q. And the selling of the dolls?

18 A. And the selling of the dolls.

19 Q. And do you recall around the same period a time when
20 Mr. Montwillo had an art show with the dolls?

21 A. Yes, yes.

22 Q. Do you recall that art show to be at 111 Minna?

23 A. Yes, I do.

24 Q. Did you attend that art show?

25 A. I certainly did.

1 Q. And did you view the dolls at the art show?

2 A. Yes.

3 Q. Do you recall any dolls at the art show that looked
4 like Trailer Trash -- that were Trailer Trash Barbie
5 dolls?

6 A. No, actually the doll I recall was -- what I will
7 give Paul credit for -- was the one where he had the
8 two ice skaters. I can't remember. Tonya Harding,
9 and one of the dolls was carrying a bat. That was
10 very funny. That's the doll I remember.

11 Q. And you don't recall any of the other dolls that
12 were --

13 A. No, I really don't.

14 Q. -- presented? So if I were to tell you that
15 Mr. Montwillo sold dolls at your store that were
16 called Trailer Trash Barbie dolls, you wouldn't have
17 a recollection of anything other than that? You
18 wouldn't have a reason to say that that was
19 incorrect?

20 MR. WONG: I'm going to object to your
21 question as vague and ambiguous as to time and
22 place.

23 MR. SOMMERS: I'll rephrase.

24 Q. In the beginning when you were selling the Barbie
25 dolls out of your store, if I were to say that

1 Mr. Montwillo was selling a Trailer Trash Barbie
2 doll, as you sit here today, you couldn't tell me
3 that was inaccurate, correct?

4 A. Nor could I say it was necessarily accurate.

5 Q. And if I were to sit here today and tell you that one
6 of the dolls that was sold from your store as a
7 Barbie doll was a Trailer Trash Barbie doll with dark
8 roots and a cigarette hanging out of her mouth and a
9 missing front tooth, you couldn't tell me that would
10 be inaccurate; is that correct?

11 A. Wait a minute. Wait a minute. Wait a minute. That
12 is -- isn't that a convoluted question?

13 MR. WONG: Let's have it read back.

14 THE WITNESS: Yeah, yeah. I --

15

16 (Record read as requested.)

17

18 THE WITNESS: Since I don't recall --

19 MR. WONG: I'm going to state an objection.
20 The question is compound, makes no sense whatsoever
21 and was grammatically incorrect.

22 If you can answer it and formulate a response, go
23 ahead.

24 THE WITNESS: Read it back again.

25 MR. SOMMERS: I'll rephrase it.

1 Q. Earlier you said that you don't recall any of the
2 models, the dolls, that were sold from your store
3 under the Barbie doll, the Barbie doll era, the pink
4 boxes. So I'm just confirming that if I were to say
5 that one of those dolls that were sold was a
6 blond-haired Trailer Trash Barbie doll with dark
7 roots, you couldn't tell me that was inaccurate?

8 A. That's what you're saying. That's not what I'm
9 saying.

10 Q. I'm saying you don't have any recollection otherwise,
11 correct?

12 A. Oh, you're -- can I speak to my attorney?

13 MR. WONG: I don't understand the question.

14 THE WITNESS: I don't understand the
15 question either. These are complicated questions.

16 MR. SOMMERS: No, it's not a complicated
17 question.

18 THE WITNESS: Yes, they are.

19 MR. SOMMERS: Let me rephrase. I want to
20 make this very simple for you.

21 Q. Earlier this morning you said that you don't
22 remember, that you don't have any memory of --

23 MR. WONG: Well, why don't you ask him if
24 that is the case.

25 MR. SOMMERS: Will you not interrupt me,

1 please?

2 MR. WONG: Well, I'm trying to help you.

3 MR. SOMMERS: I don't need your help,

4 Mr. Wong.

5 MR. WONG: Obviously you do. But if you're
6 not going to accept it, that's fine. We're just
7 going to be here for a long time asking the same
8 question.

9 MR. SOMMERS: Unfortunately, I have a very
10 short list, and we'll be here as long as it takes for
11 us to get through it.

12 Q. Mr. Tull, you said earlier that you don't have a
13 memory of the specific models that were sold in your
14 store in the pink boxes, correct?

15 A. No, I don't have a specific memory of them, no.

16 Q. So that means you -- if there were a doll that was
17 sold in a pink box that looked like the dolls that
18 were sold later in Arsenic & Apple Pie, you wouldn't
19 have a memory whether that doll existed in the pink
20 box?

21 MR. WONG: Objection. I don't understand
22 the question at all. It makes no sense. Don't
23 answer it.

24 THE WITNESS: I'll follow the advice of my
25 attorney. I don't understand the question.

1 MR. SOMMERS: Okay. Let's try this one more
2 time.

3 Q. If Mr. Montwillo asserted that the dolls that he sold
4 in your store before the formation of Arsenic & Apple
5 Pie were substantially similar to the dolls that were
6 sold after the formation of Arsenic & Apple Pie, you
7 don't have a memory that would contradict that,
8 correct?

9 MR. WONG: Objection. First of all, you
10 haven't established any sort of groundwork as to what
11 the dolls look like either before or after or what
12 the terms substantially similar" is implying. I'm
13 going to object. It's vague and ambiguous, clearly
14 overbroad and impossible to answer. If you can
15 formulate a response, you can.

16 THE WITNESS: I'm trying to, but I can't.
17 So I'm sorry.

18 MR. SOMMERS:

19 Q. Could you describe for me the Trailer Trash doll that
20 was sold by Arsenic & Apple Pie?

21 A. No.

22 Q. You can't describe the details of that doll?

23 A. No.

24 Q. Can you answer whether you have a memory of any doll
25 that looked like the doll that was sold under Arsenic

1 & Apple Pie as a Trailer Trash doll --

2 A. No.

3 Q. -- before it --

4 MR. WONG: Hold on a second.

5 MR. SOMMERS:

6 Q. -- before the formation of Arsenic & Apple Pie?

7 MR. WONG: Well, first of all --

8 MR. SOMMERS:

9 Q. -- from your store?

10 MR. WONG: Your question assumes facts not
11 in evidence.

12 MR. SOMMERS: It's not a proper objection in
13 a deposition.

14 MR. WONG: Fine. If you want to end it,
15 that's fine. I'm trying to tell you, your question
16 makes no sense whatsoever. It's improper, compound,
17 contains facts not in evidence and assumes facts not
18 in evidence and asks the witness to speculate as to
19 what you're trying to ask.

20 If you want to rephrase it and ask him a proper
21 question that can be answered in a non-convoluted
22 fashion, you're free to do so. But that question,
23 no. He's not going to answer it.

24 MR. SOMMERS:

25 Q. Do you have a specific memory -- withdraw that.

1 As you sit here today, are you able to affirm the
2 following sentence: Before the formation of Arsenic
3 & Apple Pie, you sold in your store a doll that was
4 called Trailer Trash Barbie doll?

5 MR. WONG: Do you recall that specific title
6 of a doll?

7 THE WITNESS: No, I don't recall.

8 MR. SOMMERS: Okay.

9 Q. Are you able to disaffirm the statement, before the
10 formation of Arsenic & Apple Pie, there was a doll
11 that was sold called Trailer Trash Barbie doll?

12 A. He sold me many different dolls, and each one was
13 different, so I can't. And frankly, my store has
14 hundreds and hundreds and hundreds of articles and
15 items in it. I can't honestly tell you, answer that
16 question.

17 Q. So the answer would be no to the question that you
18 can't disaffirm the statement --

19 A. I can't disaffirm?

20 Q. Yes.

21 A. That's going -- can I talk to my lawyer 'cause
22 honestly, since I -- this is complex. You're asking
23 me to affirm some, some, some --

24 Q. I'm asking you to negate --

25 A. Something that I don't know --

1 MR. WONG: (Inaudible) -- have to affirm it.
2 It's silly.

3
4 (Off the record at 11:01 a.m. and
5 back on the record at 11:03 a.m.)
6

7 MR. SOMMERS:

8 Q. Are you familiar with the five different dolls that
9 were sold by Arsenic & Apple Pie?

10 A. Yes.

11 MR. WONG: Well, hold on a -- which five
12 dolls? Arsenic & Apple Pie --

13 MR. SOMMERS:

14 Q. Are you familiar with a doll sold by Arsenic & Apple
15 Pie called Trailer Trash Doll?

16 A. Yes.

17 Q. Are you familiar with a doll sold by Arsenic & Apple
18 Pie called Blonde Drag Queen Doll?

19 A. Yes.

20 Q. Are you familiar with a doll sold by Arsenic & Apple
21 Pie called Red Head Drag Queen Doll?

22 A. Yes.

23 Q. Are you familiar with a doll that was sold by Arsenic
24 & Apple Pie called --

25 MR. WONG: Go ahead.

1 would think most of that fell to me because there was
2 no participation from him.

3 Q. At any time during the existence of Arsenic & Apple
4 Pie, did Paul Montwillo receive a paycheck?

5 A. No.

6 Q. At any time was Paul an employee of Arsenic & Apple
7 Pie?

8 A. That is a complex question. I don't know how to
9 answer that.

10 Q. Was there ever any workers' compensation procured
11 because of Mr. Montwillow's contributions to Arsenic
12 & Apple Pie, to make sure he was covered under
13 workers' compensation?

14 A. Why do he get covered? For what?

15 Q. I'm asking you a yes-or-no question, Mr. Tull.

16 A. There was no workers' comp.

17 Q. At any time was there employment taxes paid on behalf
18 of Mr. Montwillo?

19 A. He was not an employee.

20 Q. Returning to the Exhibit 1, this one here. That
21 first page of the pregnant doll, did you physically
22 put a black leather jacket on a doll that was
23 pregnant at any time?

24 A. Did I physically put a black leather jacket on a
25 doll?

1 3.8 reads: "If a member loans money to the company,
2 said loan shall bear interest at" -- and I believe
3 that's supposed to say "variable rates depending on
4 the origin of funds, percentage per annum as of the
5 date the funds were advanced to or on behalf of the
6 company until paid."

7 Is that your handwriting where it has in there
8 "variable rates depending upon the origin of the
9 funds"?

10 A. I believe it is my handwriting, yes.

11 Q. And is it also your handwriting in section 3.10 where
12 it says, "variable rates depending upon the origin of
13 the funds"?

14 A. Yes.

15 Q. And was it under these general sections that you
16 ended up loaning so much money to the company?

17 A. Yes.

18 Q. Okay, all right. If you could please turn to page 8.

19 Do you have a page 8, David?

20 MR. WONG: No, no.

21 MR. SOMMERS: You're good?

22 MR. WONG: Yeah.

23 MR. SOMMERS: Okay.

24 Q. At the bottom, 2.7, it says, "The managing members
25 shall be as follows: Paul Montwillo."

1 Then after that, it says, "Manager in charge of
2 art direction, design and advertising of product
3 line, including but not limited to corporate
4 identification, product design, packaging, website
5 design, website maintenance and print advertising."

6 And then it says, "William Tull, manager in
7 charge of administration, business affairs,
8 accounting, distribution, sales and manufacturing."

9 Is it fair to say that your understanding of this
10 section was a differentiation of the scope of
11 responsibility between you and Mr. Montwillo?

12 A. When it was initially done, yes.

13 Q. That he would do some things, and you would do some
14 other things?

15 A. Yes.

16 Q. Is there anywhere in this agreement that you were
17 aware of -- and I can say I've read it several
18 times -- that you could point to me where there is a
19 conveyance of a copyright?

20 A. Again, you're trying to confuse me. And let me tell
21 you why. You first got me going back saying that I
22 dissolved the company when I did not. Paul's
23 bankruptcy dissolved the company. So I'm really --
24 could you possibly ask me that question one more
25 time?